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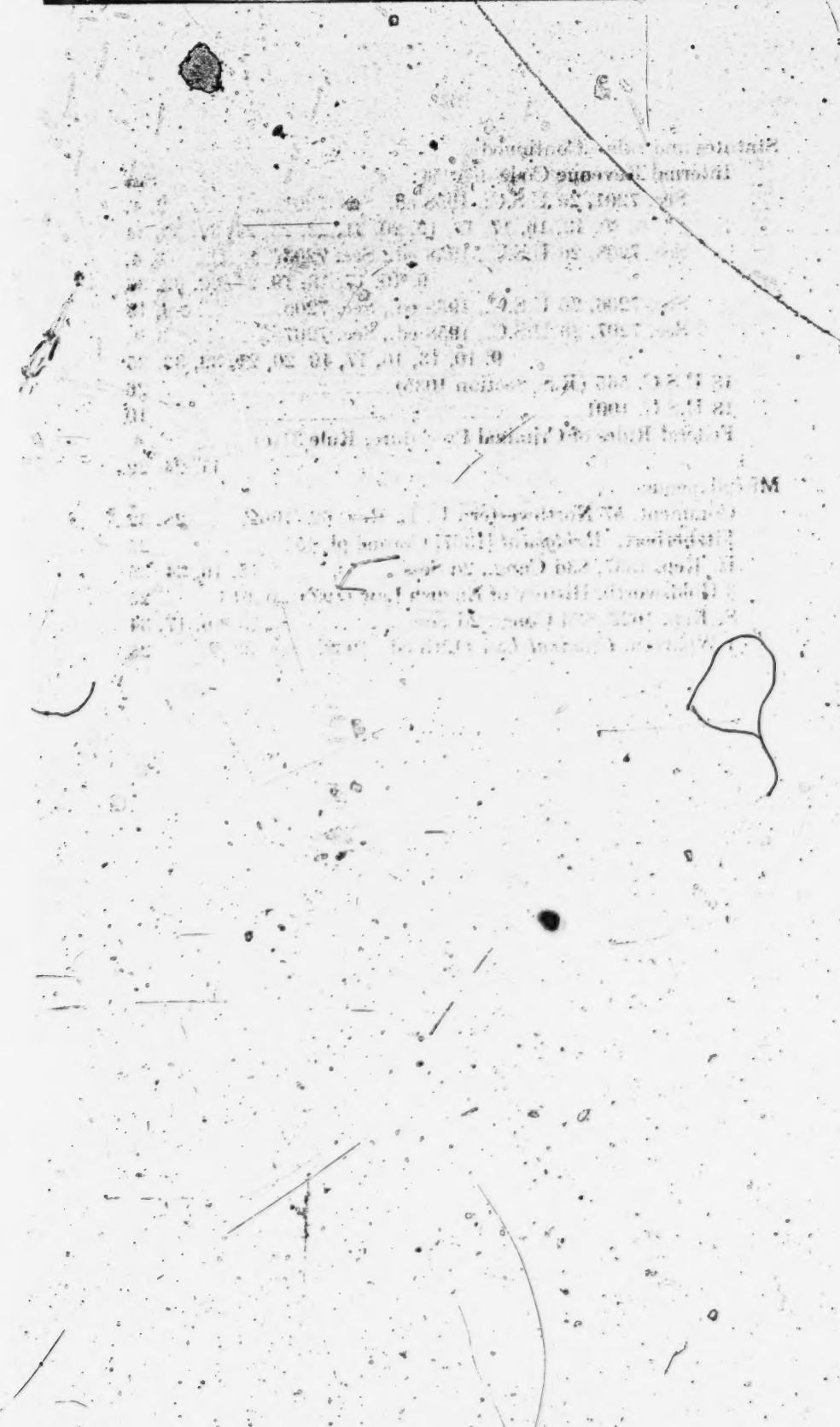

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 365

MICHAEL C. SANSONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions in the court of appeals (R. 228–241) are reported at 334 F. 2d 287.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1964. (R. 241.) The petition for a writ of certiorari was filed on August 10, 1964, and was granted on October 26, 1964, limited to the first two questions presented. (R. 242–243; 379 U.S. 886.) The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The petition for certiorari was granted limited to the following two questions:

"1. Whether the willful delivery of a false income tax return, a misdemeanor under Section 7207 of the Internal Revenue Code of 1954, is a lesser included offense within Section 7201 thereof, making it a felony to willfully attempt in any manner to evade one's income tax, and whether a defendant is entitled under Rule 31(c) of this Federal Rule of Criminal Procedure to a lesser offense instruction with respect thereto.

"2. Whether the willful failure to pay one's income tax, a misdemeanor under Section 7203 of the Internal Revenue Code of 1954, is a lesser included offense within Section 7201 thereof making it a felony to willfully attempt in any manner to evade one's income tax, and whether a defendant is entitled under Rule 31(c) of the Federal Rules of Criminal Procedure to a lesser offense instruction with respect thereto."

STATUTES AND RULE INVOLVED

Internal Revenue Code of 1954:

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both,

together with the costs of prosecution. [26 U.S.C., 1958 ed., Sec. 7201.]

SEC. 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. [26 U.S.C., 1958 ed., Sec. 7203.]

SEC. 7207. FRAUDULENT RETURNS, STATEMENTS, OR OTHER DOCUMENTS.

Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both.

[26 U.S.C., 1958 ed., Sec. 7207.]

Federal Rules of Criminal Procedure:

Rule 31.

VERDICT.

* * * * * *

(e) *Conviction of Less Offense.* The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

* * * * * *

STATEMENT

On January 30, 1963, petitioner was indicted in the United States District Court for the Eastern District of Missouri on two counts charging that he willfully attempted to evade large parts of his income taxes for the years 1956 and 1957 by filing false and fraudulent returns. The violations were charged under Section 7201 of the Internal Revenue Code of 1954, which makes such conduct a felony punishable by a fine of up to $10,000, imprisonment of up to 5 years, or both. (26 U.S.C. 7201; R. 1–2). After a jury trial, petitioner was acquitted on Count I of the indictment, relating to 1956, and found guilty on Count II, relating to 1957. (R. 191.) On July 19, 1963, he was sentenced to pay a fine of $2,000 and to serve 15 months' imprisonment. (R. 192–193.)

The issues before this Court solely concern the right of petitioner to demand at trial that the jury be instructed that, if they did not find him guilty under Section 7201, they might alternatively find him guilty of violating either Section 7207 or Section 7203 of

the Code. (26 U.S.C. 7207, 7203). Those sections create misdemeanors rather than felonies: Section 7207 makes it a misdemeanor willfully to file a false return and carries a maximum penalty of a $1,000 fine, one year's imprisonment, or both. Section 7203 makes it a misdemeanor willfully to fail to pay a tax and carries a maximum penalty of a $10,000 fine, one year's imprisonment, or both. The trial judge refused to deliver the requested instructions and the court of appeals unanimously affirmed.

The evidence relevant for present purposes may be briefly summarized:[1]

In March 1956, petitioner and his wife purchased a tract of land near St. Louis for $22,500 (R. 15, 18–19, 128) and simultaneously sold a portion of the tract for $20,000 (R. 19–21, 28–29). In August 1957, petitioner sold another portion of the tract for $27,000 (R. 31–32). Petitioner did not report his capital gain on either the 1956 sale or the 1957 sale on his income tax returns for those years. (R. 131, 135, 143, 211.) The result of petitioner's omission of the 1957 capital gain from the joint income tax return of himself and his wife (the offense of which he was convicted) was that their income tax liability was declared as $592.79 (R. 211), when in fact the true amount was $3,105.29 (R. 79, 108), an understatement of $2,512.50. In an affidavit signed by petitioner during the Treasury investigation of his

[1] The evidence is also summarized in the opinion below (R. 229–234).

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returns, he explained his conduct as follows (R. 76–77; 231):

> * * * I did not report the 1956 sale in our 1956 joint income tax return because I thought I was entitled to recover my entire cost before reporting any sale in my income tax returns. I did not report the 1957 sale in our joint income tax return for 1957 because I was burdened with a number of financial obligations and did not feel I could raise the money to pay any tax due. It was my intention to report all sales in a future year and pay the tax due. I knew that I should have reported the 1957 sale, but my wife did not know that it should have been reported. It was not my intention to evade the payment of our proper taxes and I intended to pay any additional taxes due when I was financially able to do so.

At trial, petitioner repudiated this affidavit, stating that he had signed it because he feared that, if he did not, his wife might be prosecuted. (R. 137–140.) The defense he offered at trial was that he had not reported the 1957 gain because he feared that he might have to make extensive repairs in a creek adjoining the portion of the tract he still owned, and that the cost of those repairs might wipe out his profit. (R. 114–115, 135, 143.) Conceding that "the gain was realized, that it was not reported, and that it should have been" (court of appeals' opinion, R. 228), petitioner thus urged that at the time he made his return he did not believe that a tax was payable in consequence of the sale. While the jury apparently accepted this defense as to the 1956 sale (in

which respect it was consistent with petitioner's affidavit), it rejected it as to the 1957 sale.

The full instructions requested by petitioner were as follows (R. 195–197):

> DEFENDANT'S REQUESTED INSTRUCTION No. 1
>
> Under the law you may find a defendant guilty of a lesser crime than the crimes charged in the indictment.
>
> A statute upon which a lesser crime is based (Section 7203 of the Internal Revenue Code of 1954), omitting that part of the Act which does not apply in this case, reads as follows:
>
> > "Any person required under this title to pay any * * * tax, * * * who willfully fails to pay such tax, * * * at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor,"
>
> and then the statute provides for the penalty.
>
> Therefore, if you find beyond a reasonable doubt that (with respect to either or both of the counts in this indictment) the defendant willfully failed to pay the correct tax to the United States at the time of the filing of his return, but you further find that the defendant did not willfully attempt to defeat and evade his income taxes by the filing of a false and fraudulent return, you will in your verdict say "Guilty of violating a lesser-included offense."
>
> If you have a reasonable doubt as to whether defendant willfully failed to pay the correct tax when filing his income tax return or returns under any count or counts of this indictment, you will resolve the doubt in favor of the de-

fendant and acquit him of the lesser-included offense as to such count or counts.

DEFENDANT'S REQUESTED INSTRUCTION No. 2

As I have said previously, the law permits the jury to find a defendant guilty of any lesser offense which is necessarily included in the crime charged. The offense charged in the indictment here necessarily includes a lesser offense based upon the following statute (Section 7207 of the Internal Revenue Code of 1954), omitting that part of the Act which does not apply in this case; it reads as follows:

> "Any person who willfully delivers or discloses to the Secretary [of the Treasury] or his delegate any * * * return, * * *, * * * or other document known by him to be fraudulent or to be false as to any material matter,"

and then the statute provides for the penalty.

Therefore, if you find beyond a reasonable doubt that (with respect to either or both of the counts in this indictment) the defendant willfully delivered to the District Director of Internal Revenue at St. Louis, Missouri his and his wife's federal joint income tax return or returns for the years 1956 and 1957 which were known by him to be fraudulent or false as to any material matter, but you further find that the defendant did not willfully attempt to defeat and evade his income tax by the filing of a false and fraudulent return, you will in your verdict say "Guilty of violating a lesser-included offense."

If you have a reasonable doubt as to whether defendant willfully so delivered under any

count or counts of this indictment his and his wife's federal joint income tax return or returns which were known by him to be fraudulent or false as to a material matter, you will resolve the doubt in favor of the defendant and acquit him of the lesser-included offense as to such count or counts.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States Code contains five criminal provisions which, on the basis of their language, might conceivably be applied to taxpayers who deliberately commit income tax evasion through the submission of false returns. Four of these provisions appear in the Internal Revenue Code of 1954 (26 U.S.C.); one is in the Criminal Code (18 U.S.C.). (1) Section 7201 of the Internal Revenue Code makes it a felony willfully to attempt to evade a tax in any manner. It imposes a fine of not more than $10,000 and imprisonment of not more than five years, or both. (2) Section 7203 of the Code makes it a misdemeanor willfully to fail to pay a tax. It imposes a fine of not more than $10,000 and imprisonment of not more than one year, or both. (3) Section 7206(1) of the Code makes it a felony willfully to subscribe to a false document containing a declaration that it is made under the penalties of perjury. (The income-tax return contains such a printed declaration.) It imposes a fine of not more than $5,000 and imprisonment of not more than three years, or both. (4) Section 7207 of the Code makes it a misdemeanor willfully to file any document, including a return, which is known to be false as to a material matter. It imposes a fine of

not more than $1,000 and imprisonment of not more than one year, or both. (5) Section 1001 of the Criminal Code makes it a crime willfully to make a false statement or submit a false document to any agency of the United States. It imposes a fine of not more than $10,000 and imprisonment of not more than five years, or both.

This case concerns the application of three of the foregoing provisions: Sections 7201, 7203 and 7207 of the 1954 Code. The precise question is whether the petitioner, accused only under Section 7201, a felony provision, had the right to insist that the jury be instructed that he might alternatively be convicted under either of the two other provisions, creating misdemeanors and carrying lower maximum penalties. Petitioner's requested instructions were refused by the trial court. The jury then acquitted petitioner as to one of the two years in question and convicted him as to the other. He was sentenced to pay a $2,000 fine and to serve 15 months' imprisonment. This sentence was greater than would have been permissible under either of the misdemeanor provisions standing alone.

Closely related issues were before the Court in the mid-1950s in two cases arising under provisions of the Internal Revenue Code of 1939. In *Berra* v. *United States*, 351 U.S. 131, the petitioner had been indicted and convicted under Section 145(b) of the 1939 Code for filing a false return with intent to evade the tax. Section 145(b) was the counterpart of Section 7201 of the 1954 Code (although Section 145(b) applied only to income tax evasions while Section 7201 is gen-

erally applicable to evasions of all taxes imposed by Title 26). The petitioner in *Berra*, like petitioner here, requested and was refused an instruction that he might alternatively be convicted under Section 3616 (a) of the 1939 Code, a section making the submission of a fraudulent statement or return with intent to evade tax a misdemeanor and carrying a much lower maximum penalty than Section 145(b). The Court assumed that Section 3616(a) was applicable to income tax evasions practiced through fraudulent returns. It also assumed that, as a general rule, a defendant would be entitled, under Rule 31(c) of the Federal Rules of Criminal Procedure, to an instruction on an offense not charged in the indictment if "the evidence justified" the conclusion that "some of the elements of the crime charged themselves constitute a lesser crime." 351 U.S. at 133–134. The Court nevertheless held (Mr. Justice Black and Mr. Justice Douglas dissenting) that it had been proper to refuse the requested instruction. The Court found that, in the light of the evidence at the trial, there was no way in which the jury in *Berra* could rationally have found the facts necessary to convict of a violation of Section 3616(a) without also convicting of a Section 145(b) violation; in the factual context, the elements of the two offenses were identical. Thus, "the instruction requested by petitioner would not have added any [factual] issue for the jury's determination. When the jury resolved those issues against petitioner, its function was exhausted, since there is here no statutory provision giving to the jury the right

to determine the punishment to be imposed after the determination of guilt." 351 U.S. at 134–135.

Achilli v. *United States*, 353 U.S. 373, was decided one year after *Berra*. Like *Berra* and the present case, it was a prosecution for a willful attempt to evade income taxes through a fraudulent return. Again, the only offense charged was the felony of willful evasion. However, Achilli, unlike Berra and the instant petitioner, did not challenge the failure to give an instruction as to lesser offenses. Rather, he challenged his sentence, which was within the maximum limits set by Section 145(b) but greater than the maximum which would have been permitted had conviction been solely under Section 3616(a). The Court did not reach the sentencing issue thus presented. Instead, it responded to the government's invitation to reconsider the assumption which had been made in *Berra*, *i.e.*, that Section 3616(a) could be used to prosecute unlawful income tax evasions. After consideration of the history of Section 3616(a), the Court concluded (Mr. Justice Black and Mr. Justice Douglas again dissenting) that Section 3616(a), despite the fact that it was literally applicable, should not be read to cover cases of income tax evasion. Congress had impliedly repealed the misdemeanor sanction in such cases and substituted the Section 145(b) felony. As a result, petitioner had no claim to have his sentence measured by Section 3616(a), and the sentence was affirmed. In consequence of the *Achilli* decision, the government abandoned all pending prosecutions under Section 3616(a). After *Achilli* it initiated no new prosecutions under that section and it has initiated no misde-

meanor prosecutions of fraudulent income tax returns under Section 7207 of the 1954 Code.

In the 1954 Code, certain changes were made in the relevant criminal provisions applicable to false returns and tax evasions. We discuss their effect in the first part of our argument. Specifically, in the 1954 Code the misdemeanor provision applicable to false returns (Section 7207) does not duplicate the general felony provision (Section 7201) in requiring evasion to be proved. We submit that on the basis of these explicit legislative changes it is even clearer than it was under the 1939 Code (where the result reflected in the *Achilli* decision could be reached only through an examination of history) that Congress regarded willful evasion of income taxes only as a felony and that the misdemeanor provisions of the 1954 Code are applicable only when evasion is not established. Where the felony is charged and proved, therefore, there is no room for a contention that the jury has an option under the Code to treat the offense as either a felony or a misdemeanor.

Turning from the question of Congressional purpose to the general principles of the criminal law, we show that petitioner was not entitled to the requested misdemeanor instructions in this case. Such an instruction is available only when, on a reasonable view of the evidence, the defendant may be found guilty of the included offense while being acquitted of the offense charged. In this case, however, the jury could not have found petitioner guilty of either of the two misdemeanors as to which he requested instructions without concluding, of necessity, that the felony of income tax evasion was also committed.

ARGUMENT

I. THE STRUCTURE AND HISTORY OF THE 1954 CODE PRECLUDE A CLAIM THAT CONGRESS PROPOSED TO GRANT JURIES AN OPTION TO PUNISH ONE CHARGED WITH AND FOUND GUILTY OF WILLFUL EVASION OF INCOME TAXES EITHER AS A FELON OR AS A MISDEMEANANT

We deal first with the special contention, seemingly reflected in the petitioner's brief and in the dissenting opinions in both *Achilli* v. *United States*, 353 U.S. 373, and *Berra* v. *United States*, 351 U.S. 131, that the structure of the Internal Revenue Code reveals a Congressional intention to provide the jury in tax evasion cases with the option to treat a proved evasion as a misdemeanor rather than as a felony as charged. We submit that, whatever doubts may have been present on that score under the 1939 Code, they have been wholly and clearly resolved against such jury discretion in the 1954 Code.*

In *Achilli* v. *United States*, 353 U.S. 373, this Court held Section 3616(a) of the Internal Revenue Code of 1939 inapplicable to all willful evasions of the income tax, despite the fact that Section 3616(a) in terms made it a misdemeanor for any person to deliver to the Collector "any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made * * *." The Court recognized that the original predecessor to Section 3616(a) had been enacted as a general provision applicable to evasion of federal taxes, including the earliest income taxes, through fraudulent documents. It found, however,

* As we show *infra*, pp. 19-35, petitioner's claim is also precluded by general principles relating to included-offense instructions.

that with the enactment of the income tax legislation which followed the passage of the Sixteenth Amendment, Congress had enacted specific penalties for willful income tax evasion more severe than those provided by Section 3616(a)'s predecessor. Section 145(b) of the 1939 Code, creating a felony of income tax evasion, regardless of the means used to evade, was the successor to these evasion provisions. The Court held that these subsequent enactments constituted repeals, *pro tanto*, of the predecessor of Section 3616(a), making it no longer applicable to income tax evasions. The Court further found, despite Section 3616(a)'s subsequent inclusion in the 1939 Code, that no legislation had revived the application of Section 3616(a) to income tax evasion cases. *Achilli* thus held that, by the time of the 1939 Code, the government was not entitled to proceed by way of information under the misdemeanor section in cases involving fraudulent returns, where the acts charged, if true, necessarily constituted the felony of income tax evasion. In such cases, the government was compelled to proceed by indictment (unless that safeguard was waived) if it wished to bring criminal charges at all and the jury, while it might either convict or acquit of the felony, had no option to treat the defendant as a misdemeanant.

In the 1939 Code, separate criminal provisions applied to the various taxes imposed by the several chapters. The expressed congressional purpose of the 1954 revision was to bring criminal offenses together in one chapter of the Code (Chapter 75) through provisions of general applicability. S. Rep. 1622, 83d Cong., 2d Sess., p. 147; H. Rep. 1337, 83d

Cong., 2d Sess., p. 108. We submit that, in doing so, Congress intended no change from the prevailing policy that acts amounting to evasions of the income tax should be prosecuted and judged exclusively as felonies upon grand jury indictment. Indeed, the legislative history shows an affirmative purpose uniformly to treat tax evasion as a felony.

In their general commentary upon Chapter 75 of the 1954 Code, the House and Senate Reports accompanying the 1954 Code revision stated that one of its principal objectives in revising and bringing together the various criminal tax provisions was to provide "uniform penalties * * * instead of the varying penalties now provided for what in substance is the same offense, namely, the attempt to evade the tax. For offenses of this type, the penalties usually provided by the new provisions are fines of up to $10,000 or imprisonment up to 5 years or both [the penalties provided by Section 7201, the felony provision under which petitioner was prosecuted]. Minimum penalties, however, are omitted. Thus it will be possible for the judges to better fix the penalties to fit the circumstances." H. Rep. No. 1337, *supra*, p. 108. (The Senate report contains the same language except for the last sentence quoted.)

The legislative history directed to the specific sections under which petitioner claimed instructions in this case also indicates that conduct necessarily amounting to income tax evasion was to be treated exclusively as a felony. Both House and Senate Reports state that Section 7207 "contains no material change from existing law." H. Rep., *supra*, p. A425;

S. Rep., *supra*, p. 403. Section 7207 prohibits the same fraudulent statements as did Section 3616(a) of the 1939 Code—with the change that, under Section 7207, the requirement of a tax evasion, present in Section 3616(a), has been eliminated. Since Section 3616(a) did not apply to conduct necessarily amounting to an evasion because of the presence of a felony section applying to the same conduct, it would seem clear that Section 7207, creating an offense less serious than evasion when evasion is not proved, is similarly inapplicable in the presence of Section 7201, a felony section specifically directed toward evasion of taxes. As to Section 7203, prohibiting the willful failure to do certain acts, the Senate Report, *supra*, p. 601 (whose version of the section was ultimately adopted by both Houses) states:

> Under existing law, it is a misdemeanor (with maximum punishment of $10,000 fine and 1 year imprisonment) willfully to fail to make a return at the time required by law or regulations. * * *
>
> The bill as reported by your committee amends * * * section 7203 so as to continue in effect the existing law with respect to the nature of, and the punishment for, the offense of a willful failure to make a tax return. Under these amendments, section 7201 will apply only to a willful attempt in any manner to evade or defeat the tax or the payment thereof, and the lesser offense of a willful failure to file a tax return will be punishable as a misdemeanor under section 7203.

Again, the intention to treat tax evasions under Section 7201 rather than under Section 7203 is evident.

In sum, the 1954 Code effectively achieves a sufficient system of criminal tax penalties. The primary provision in Section 7201, "the imposition of a system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of delinquency,"[4] *Spies* v. *United States*, 317 U.S. 492, 497. This section makes it a felony willfully to evade tax "in any manner." Both an affirmative act of evasion (*Spies* v. *United States*, *supra*) and a resulting tax deficiency (*Lawn* v. *United States*, 355 U.S. 339, 361) are required under this Section. When charges are made which, if true, would necessarily amount to such an evasion of tax, this felony provision governs. The remaining provisions of Chapter 75 are applicable where guilt may be demonstrated without simultaneously and necessarily demonstrating an evasion of tax. Thus, Section 7203, a misdemeanor, may apply, for example, where the defendant simply fails to pay his tax or to file a return, but is guilty of no affirmative act of evasion as required under Section 7201. Section 7206(1), a felony carrying lower maximum penalties than Section 7201, may be used where a taxpayer willfully subscribes to a false return containing a declaration that it is made under the penalties of perjury, but where such false statement, although material, does not constitute an evasion because it does not have the effect of reducing the tax liability.

[4] The statement was made with respect to Section 145(b), Section 7201's predecessor under the 1939 Code; but it is equally applicable to Section 7201's role in the 1954 Code.

This may be the case, for example, where there is some offsetting error in the fraudulent return which works to taxpayer's disadvantage, thus cancelling the deficiency, or where the fraud concerns the source, rather than the amount, of taxable income. Finally, Section 7207, a misdemeanor section carrying relatively minor penalties, applies where there is material fraud, but no evasion, and where the fraudulent statement may or may not contain a written declaration that it is made under the penalties of perjury. To repeat, however, if the charge and proof, if true, necessarily show a felonious evasion of tax under Section 7201, that section alone defines the offense and the penalties.[4]

II. WHERE, AS IN THIS CASE, THE EVIDENCE COULD NOT BE FOUND TO SHOW A LESSER OFFENSE WITHOUT ALSO ESTABLISHING THE GREATER, AN INSTRUCTION AS TO INCLUDED OFFENSES IS UNWARRANTED

We have shown above that there is no feature of the 1954 Code which would justify an inference that Congress proposed to confer upon a jury sitting in a prosecution for the felony of tax evasion the special

[4] The prosecutorial policy of the Department of Justice is in keeping with the views expressed above. Before *Achilli* v. *United States*, Section 3616(a) had been used in relatively few income tax evasion cases. When the government suggested to the Court in *Achilli* v. *United States* that Section 3616(a) was inapplicable to income tax evasions, it abandoned all prosecutions under that Section and undertook to redress punishments already administered. Since *Achilli*, the Department has authorized no prosecutions under either Section 3616(a) or Section 7207 of the 1954 Code. Nor does the Department authorize prosecuting under Section 7203 when an affirmative act of evasion is charged.

prerogative of reducing the offense to a misdemeanor, albeit all the elements of the felony are proved. There remains the question whether, under the general principles of the criminal law, there was basis for the requested instructions as to lesser included offenses. Our answer is in two steps: *first*, that on the evidence presented, the jury in this case could not rationally find that petitioner was guilty of the tax offenses in relation to which he requested instructions without also concluding that he was guilty of evasion; *secondly*, that since the rule governing instructions on lesser included offenses requires that the jury could reasonably conclude that the lesser, but not the greater, offense was committed, the instructions were properly refused.

A. IF THIS PETITIONER WAS GUILTY OF A TAX OFFENSE, HE WAS NECESSARILY GUILTY OF EVASION

Section 7201 makes it a felony willfully to attempt to evade a tax in any manner. The elements of this offense are (1) the existence of a tax deficiency (*Lawn* v. *United States*, 355 U.S. 339, 361); (2) an affirmative act constituting an evasion or attempted evasion of that tax (*Spies* v. *United States*, 317 U.S. 492); and (3) willfulness. On the other hand, the elements of a Section 7207 offense (to which we first turn) are (1) the filing of a document false as to a material matter and (2) willfulness. The ingredient of aggravation present in an offense under Section 7201, but lacking in a Section 7207 violation, is the existence of a tax liability in addition to that reported on the return. It is thus possible for Section 7207 to

be violated without a simultaneous violation of Section 7201 only should fraud exist, but no tax deficiency be present.[5] That possibility was entirely excluded in this case. Petitioner concedes the existence of a tax deficiency as the result of his understatement of income on his 1957 return. (R. 228). If this understatement was fraudulent, the felony of evasion was committed; if it was not, petitioner was innocent of both the felony and the Section 7207 misdemeanor. There is no intermediate possibility. It necessarily follows that there was no possible view of the evidence on which the jury could have found that petitioner had willfully filed a false return without simultaneously finding an evasion constituting a violation of Section 7201.

Similar analysis shows the inapplicability of Section 7203 to this case. The essential elements of the offense of willful failure created by Section 7203 are (1) the existence of a tax liability; (2) the failure to perform one of a number of specified acts at the time required by law; and (3) willfulness. As this Court pointed out in *Spies* v. *United States*, 317 U.S. 492, 499, the felony (now Section 7201) involves "some willful commission" in contrast with the "willful omissions that make up the list of misdemeanors."[6] Section 7203

[5] We gives examples of such cases, *supra*, p. 19.

[6] "We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues, Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors. Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony." *Id.* at 499.

is violated without a necessarily simultaneous violation of Section 7201 by a taxpayer who merely fails to act, without committing any affirmative act of evasion. On no view of the evidence was that this case. Petitioner's only failure here was his failure to report a portion of his income on his 1957 return. If this failure was willful, he filed a fraudulent return constituting a willful evasion under Section 7201; if this failure was not willful, he was innocent of both the felony and the Section 7203 misdemeanor. Again, there was no intermediate possibility.

In his brief in this Court, petitioner urges (Br. 23–25) that the jury might have accepted the explanation in his affidavit, *supra*, p. 6, that he had understated his 1957 income because he could not raise the money to pay the tax, but that he intended "to report all sales in a future year and pay the tax due" (Br. 23). Thus, petitioner suggests that, under the evidence, the jury might rationally have found him guilty of willfully filing a false return or willfully failing to pay his tax, without simultaneously finding him guilty of evasion. For the purpose of this argument, petitioner assumes that evasion is not made out if the jury believes that the taxpayer intended to pay "in a future year."

In reply, we point out, first, that petitioner's entire trial theory was based upon a repudiation of his affidavit, which was the only evidence supporting the contention that he intended to pay in a future year (*supra*, p. 6; R. 114–115; 137–140). Petitioner was not entitled to an instruction on a theory thus expressly repudiated at trial. See *United States* v.

Rutkin, 189 F. 2d 431 (C.A. 3), affirmed, 343 U.S. 130; *Samish* v. *United States*, 228 F. 2d 358 (C.A. 9); *Ciullo* v. *United States*, 325 F. 2d 227, 229 (C.A.D.C.).

Second, and more important, petitioner misconceives the nature of the offense under Section 7201 charged in the indictment. No defense to a Section 7201 evasion charge would be made out by demonstrating to the jury's satisfaction that petitioner willfully and fraudulently understated his tax liability with the intention to pay in a later year. This Court has recognized the sharp distinction between an attempt to defeat the *assessment* of a tax and an attempt to defeat its *payment*. *Lawn* v. *United States*, 355 U.S. 339, 341–342 and fn. 1, 361.[1] This indictment, like that in the great majority of criminal tax cases, alleges a willful attempt "to evade and defeat a large part of the income tax due * * * for the calendar year 1957, by filing * * * a false and fraudulent joint income tax return" understating taxable income and income tax in stated amounts. (R. 2.) This, of course, is an allegation of an attempt to evade the tax by defeating the *assessment* for 1957. The fact, even if believed, that petitioner intended to report his 1957 income in some future year would not detract from the criminality of this willful act defeating the 1957 assessment. That crime is complete as soon as the false

[1] Prosecutions for attempts to defeat the payment of an income tax already assessed are comparatively rare. But see *Lawn* v. *United States*, *supra*; *Cohen* v. *United States*, 297 F. 2d 760, 769–770 (C.A. 9), certiorari denied, 369 U.S. 865; *United States* v. *Bardin*, 224 F. 2d 255 (C.A. 7), certiorari denied, 350 U.S. 883.

and fraudulent return is filed.[8] *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 46; *United States* v. *Troy*, 293 U.S. 58; *Holland* v. *United States*, 348 U.S. 121, 125, 139; *Cave* v. *United States*, 159 F. 2d 464, 466 (C.A. 8); *Gaunt* v. *United States*, 184 F. 2d 284, 288 (C.A. 1); *United States* v. *Croessant*, 178 F. 2d 96 (C.A. 3), certiorari denied, 339 U.S. 927; *United States* v. *Raub*, 177 F. 2d 312, 315 (C.A. 7); *Rick* v. *United States*, 161 F. 2d 897, 898–899 (C.A.D.C.). Thus the government relied upon petitioner's affidavit at trial precisely because it showed a Section 7201 violation; and petitioner repudiated the affidavit for the same reason.

B. IN THESE CIRCUMSTANCES, NO INSTRUCTION AS TO INCLUDED OFFENSES WOULD HAVE BEEN PROPER

Petitioner invokes the so-called included offense rule embodied in Rule 31(c) of the Federal Rules of Criminal Procedure. That Rule provides:

> VERDICT
>
> * * * * *
>
> (c) *Conviction of Less Offense.* The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.
>
> * * * * *

[8] "This [a willful attempt to evade the tax] is an independent crime, complete in its most serious form when the attempt is complete, and nothing is added to its criminality by success or consummation, as would be the case, say, of attempted murder." *Spies* v. *United States*, 317 U.S. 492, 498–499.

Under the settled case law, however, the Rule applies only when the jury can rationally acquit the defendant of the charged offense while, at the same time, finding the necessary elements of an included offense. It is wholly inapplicable in a case like this one where a conviction on the included offense would necessarily presuppose a finding of guilt on the charged offense.

Rule 31(c), "a restatement of existing law,"[9] derives from principles to be found very early in the development of the common law.[10] Congress first gave these principles statutory recognition in 1872; the text of Rule 31(c) contains no relevant change from this enactment and its successors.[11]

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[9] The quotation is from the notes of the Advisory Committee for the Federal Rules. See *Berra* v. *United States*, 351 U.S. 131, 134–135 fn. 6.

[10] We are told by Holdsworth that in order for jurors to "well and truly try and true deliverance make between * * * the king and the prisoner" it was "their right to find the prisoner guilty of a lesser charge than that with which he is accused." 3 Holdsworth, History of English Law (1923), p. 613. In a prosecution for grand larceny in 1367, for example, the jury brought in a general verdict of guilty together with a special verdict assigning a lesser value than charged for the goods stolen, thereby reducing the offense from grand to petty larceny. Fitzherbert, *Abridgment*, Corone pl. 451 (1367). And see *Salisbury's Case* [1553] Plowden, 100, 101, 75 Eng. Rep. 158, 160; *Mackalley's Case* [1611] 9 Co. Rep. 61b, 77 Eng. Rep. 824; *Respublica* v. *Roberts*, 2 Dall. 124 (Pa., 1791). See also 1 Wharton, *Criminal Law* (12th ed., 1932), Sec. 33. The common-law rule was applied by this Court in 1857 in *Dynes* v. *Hoover*, 20 How. 65, 79–80.

[11] The 1872 statute (Act of June 1, 1872, Sec. 9, c. 255, 17 Stat. 196, 198) provided:

> That in all criminal causes the defendant may be found guilty of any offence the commission of which is necessarily

The included offense rule as thus developed gives either the prosecutor or the defendant the right to an instruction asking the jury to consider the defendant's guilt, in relation not only to the offense actually charged, but also in relation to a so-called included offense, *i.e.*, an offense requiring less proof than the charge, but one containing only elements which are included within the charge. Thus, under a charge of aggravated assault, the prosecution may apprehend an inability to convince the jury of the existence of the element of aggravation, while the existence of a simple assault is supported by strong proof. In such a circumstance the prosecution may properly request an instruction that the jury may convict for the included offense of assault if they do not find the aggravating elements but nevertheless find the elements of an assault without aggravation.[12] The prin-

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included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offence so charged: *Provided*, That such attempt be itself a separate offence.

This provision was incorporated into the Revised Statutes as Section 1035, and appeared in the 1934, 1940, and 1946 editions of the United States Code as 18 U.S.C. 565, the only change in language being the substitution of the word "if" for the words "*Provided*, That."

[12] A few familiar illustrations of application of the doctrine follow. A defendant charged with false pretenses may be convicted of passing a bad check. *Ciullo* v. *United States*, 325 F. 2d 227 (C.A.D.C.). A defendant charged with murder may be convicted of manslaughter if the jury finds an absence of malice. *Stevenson* v. *United States*, 162 U.S. 313, 315–316, 321–323. A man charged with robbery may be found guilty of larceny, for robbery is aggravated larceny. *Lamore* v. *United States*, 136 F. 2d 766 (C.A.D.C.). A defendant indicted for

cipal limitation upon the prosecutor's right to such an instruction is that the defendant be given adequate notice of his jeopardy under the included offense. See *Paterno* v. *Lyons,* 334 U.S. 314. Such notice is ordinarily guaranteed through the requirement that all the elements of the included offense be included within the charge.

On the other hand, a defendant may request an included offense charge where the prosecutor does not. This, indeed, is the more usual situation. The defendant may believe that the jury will entertain doubts about the existence of some elements of the charge, but may fear that those doubts will be resolved against him if the only alternative before the jury is outright acquittal. An included offense may exist which does not require the doubtful elements and which carries a lower maximum penalty than the charged offense. In such circumstances, it may be to the defendant's advantage to have a charge on the included offense before the jury.

Such an instruction thus invites the jury, if the state of the proof justifies them in doing so, to acquit the defendant upon the charged offense but to convict him of another offense requiring less proof. For this reason, the rule applies only where the charged offense requires the jury to find a disputed factual element which is not required for conviction of the

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adultery may be convicted of fornication where the evidence showed that he was unmarried. *Respublica* v. *Roberts*, 2 Dall. 124 (Pa.). An indictment for burglary supports a conviction for larceny where the jury is not satisfied as to the breaking and entering in the nighttime. *United States* v. *Dixon*, 25 Fed. Cas. No. 14,968 (C.A.D.C.).

included offense. Unless there is such a factual issue before the jury there will be no rational way for them to convict of one offense while acquitting of the other, and it would not be proper to invite them to do so. As a recent law review comment points out in summarizing the circumstances in which an included offense instruction is proper, "the evidence in the case must meet two requirements in order for an instruction on the lesser crime to be proper. It must be sufficient to support a conviction of the lesser offense and must, at the same time, be such that a finding of not guilty on the greater offense is justified. This is virtually a unanimous requirement: * * * It simply means that the state of the evidence in the case must not be such that the accused can *only* be guilty of the crime charged or not guilty at all. The courts fear that to instruct on lesser offenses will, unless there is independent evidence thereon, lead to improper speculation by the jury—will invest it with a power to commute the punishment rather than restricting itself to a determination of the facts. The application of this test in a number of common situations will mean that instructions on possible lesser offenses are precluded." [13]

The rule that an included offense instruction is proper only when there is a factual basis, in light of the evidence, upon which the jury can properly convict of the included offense while acquitting of the charged offense has also been clearly articulated by

[13] Comment, 57 Northwestern U. L. Rev. 62, 65–66 (1962). Footnotes citing numerous State and federal authorities for the propositions stated are omitted.

this Court. In *Sparf and Hansen* v. *United States*, 156 U.S. 51, 63–64, a murder prosecution where the defendant requested and was denied a manslaughter instruction under the statutory predecessor of Rule 31(c), the Court said:

> The refusal to grant the defendants' requests for instructions, taken in connection with so much of the charge as referred to the crime of manslaughter, and the observations of the court when the jury through their foreman applied for further instructions, present the question whether the court transcended its authority when saying, as in effect it did, that in view of the evidence the only verdict the jury could under the law properly render would be either one of guilty of the offence charged or one of not guilty of the offence charged; that if a felonious homicide had been committed by either of the defendants, *of which the jury were the judges from the proof*, there was nothing in this case to reduce it below the grade of murder; and that, "as one of the tribunals of the country, a jury is expected to be governed by law, *and the law it should receive from the court.*"
>
> The court below assumed, and correctly, that section 1035 of the Revised Statutes did not authorize a jury in a criminal case to find the defendant guilty of a less offence than the one charged, unless the evidence justified them in so doing. Congress did not intend to invest juries in criminal cases with power arbitrarily to disregard the evidence and the principles of law applicable to the case on trial. The only object of that section was to enable the jury, in case the defendant was not shown to be

> guilty of the particular crime charged, *and if the evidence permitted them to do so*, to find him guilty of a lesser offence necessarily included in the one charged, or of the offence of attempting to commit the one charged. Upon a careful scrutiny of the evidence, we cannot find any ground whatever upon which the jury could properly have reached the conclusion that the defendant Hansen was only guilty of an offence included in the one charged, or of a mere attempt to commit the offence charged. A verdict of guilty of an offence less than the one charged would have been in flagrant disregard of all the proof, and in violation by the jury of their obligation to render a true verdict. There was an entire absence of evidence upon which to rest a verdict of guilty of manslaughter or of simple assault. A verdict of that kind would have been the exercise by the jury of the power to commute the punishment for an offence actually committed, and thus impose a punishment different from that prescribed by law. [Emphasis in original.]

Closer to the factual setting of the present case is *Berra* v. *United States*, 351 U.S. 131, summarized *supra*, pp. 10–12. There, as here, the Court found that there was no way in which the jury could have found the facts sufficient to constitute guilt under the allegedly included misdemeanor without also finding the facts constituting guilt under the charged felony. The Court said (at 134–135):

> Petitioner contends that he was nevertheless entitled to the requested instruction. He argues that since there was no difference in the proof required to establish violations of §§ 145(b)

and 3616(a) [of the Internal Revenue Code of 1939], the indictment must be taken as charging violations of both sections, and the jury under Rule 31(c) should have been permitted to make the choice between the two crimes. We do not agree.

The role of the jury in a federal criminal case is to decide only the issues of fact, taking the law as given by the court." *Sparf* v. *United States*, 156 U.S. 51, 102. Certainly Rule 31(c) was never intended to change this traditional function of the jury. Here, whether § 145(b) or § 3616(a) be deemed to govern, the factual issues to be submitted to the jury were the same; the instruction requested by petitioner would not have added any other such issue for the jury's determination. When the jury resolved those issues against petitioner, its function was exhausted, since there is here no statutory provision giving to the jury the right to determine the punishment to be imposed after the determination of guilt. Whatever other questions might have been raised as to the validity of petitioner's conviction and sentence, because of the assumed overlapping of §§ 145 (b) and 3616(a), were questions of law for the court. No such questions are presented here. [Footnotes omitted.] [14]

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[14] See also Mr. Justice Frankfurter's dissenting opinion in *Green* v. *United States*, 355 U.S. 184, 214–215:

"By instructing on second degree murder when the evidence did not warrant a finding of such an offense, the court gave the jury an opportunity for compromise and lenity that should not have been available. * * * the judge's erroneous instruction permitted the jury, for its own undisclosed reason, to render an irrational verdict."

The application of this rule to the present case needs no further demonstration. Since there was no rational way in which the jury in this case could have acquitted petitioner of the Section 7201 charge while convicting him of violating either Section 7207 or Section 7203, those misdemeanors were not offenses which could properly have been submitted to the jury. To have done so would have been to ask the jury not to find facts, but improperly to exercise discretion over the penalty to be imposed.[15] Petitioner's requested instructions were therefore properly refused, even without reference to the policy of the 1954 Code to treat tax evasions exclusively under the Section 7201 felony provision.[16]

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[15] Indeed, an examination of the requested charges shows that they made no attempt to point to any factual issue whatever separating the misdemeanor offenses from the charged felony in light of the evidence before the jury. In this Court, petitioner seeks to discover such a factual issue by contending that he would be guilty of a misdemeanor, but innocent of the felony of evasion, had the jury found that, while he intended his fraud and his underpayment, he also intended to pay in a future year. As we point out, *supra*, pp. 23–24, petitioner is wrong to suppose that his intention to pay in a future year would exculpate him from the felony In any event, since petitioner repudiated this theory of his conduct at trial, he naturally did not request that the jury be instructed with reference to it.

[16] In the body of the brief we argue the case upon the supposition that the question whether one offense is included within another is to be decided by reference to the charge in the particular case. This is the view of the majority of jurisdictions. See Comment, 57 Northwestern U. L. Rev. 62 and cases cited therein. In this majority view, if all of the elements of the lesser offense are included within the charge actually made, the offense is an included offense. Nevertheless, as we show, an instruction is not automatically proper. The additional re-

In their dissenting opinion in *Berra*, 351 U.S. 131, 135, Mr. Justice Black and Mr. Justice Douglas suggest two reasons for disagreeing with the Court's decision in that case. *First*, they suggest that, as a matter of statutory inference, where precisely the same acts constitute both a misdemeanor and a felony, there should be no discretion in the prosecution to proceed upon the more serious felony charge for "[c]riminal statutes, which forfeit life, liberty or property, should be construed narrowly, not broadly." *Id.* at 138. *Secondly*, they suggest that constitutional doubts would be raised by placing discretion as to penalty in a federal prosecutor rather than in the judge or

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quirement must be met that the jury be able rationally to acquit the defendant of the charged offense while convicting him of the included offense—otherwise the charge would call upon the jury to perform a sentencing function not properly theirs. As we seek to demonstrate, that additional requirement was not met in this case because the jury here could not have rationally convicted under either Section 7203 or Section 7207 without also finding the facts necessary to convict under Section 7201.

There is, however, a narrower view of included offenses than the one upon which the body of the brief is written. Under this view, an offense is not included within the charged offense unless all of its statutory elements are necessarily included within the *statutory definition* of the charged offense. See *State* v. *Woolman*, 84 Utah 23; *State* v. *Rohletter*, 108 Utah 432; *State* v. *Waid*, 92 Utah 297; *State* v. *Clayton*, 236 La. 1093; *State* v. *Poe*, 214 La. 606; *State* v. *Roberts*, 213 La. 559. Under this view, the Section 7203 and Section 7207 misdemeanors could not possibly have been deemed offenses included in the Section 7201 charge, for it is evident that the offense under Section 7201, as statutorily defined, may be committed in many ways which do not simultaneously involve violations of either misdemeanor. Thus the question whether the jury could rationally convict of one offense while acquitting of the other would not even be reached.

jury. These views did not of course command a majority of the Court in *Berra*, but we submit that, even if they had, they would not control the result here.

In *Berra*, the allegedly included misdemeanor contained all the elements of the felony, with the additional requirement that the evasion be committed through a fraudulent statement. In that circumstance, where the misdemeanor demanded at least as much proof as the felony, it was possible to argue, through the application of a rule of lenity, that Congress intended the misdemeanor, rather than the felony, to apply where the misdemeanor was applicable. No such argument is plausible under the 1954 Code, where the misdemeanors are drawn so as to require substantially less proof than the Section 7201 felony. As shown in Point I of this brief, *supra*, Congress made clear its desire to treat "what in substance is the same offense, namely the attempt to evade tax" uniformly under the felony provisions of Section 7201. H. Rep. *supra*, p. 108; S. Rep., *supra*, p. 147. It would wholly distort this desire to require the government to proceed by way of misdemeanor whenever the elements of a misdemeanor were present even though the felony of evasion had also been committed. The result of such a holding would be virtually to eliminate the application of the felony statute—the direct contrary of what Congress intended.

Nor is there reason, in this case, to be concerned with possible constitutional objections which might be inherent in a scheme giving a federal prosecutor discretion as to the penalty to be imposed upon particular defendants. Such objections are not relevant here because, under the 1954 Code, a prosecutor has no unbridled discretion. As both the House and Senate Reports emphasize, minimum penalties are omitted in the Code for the offenses relating to this case so that it would be "possible for the judges to better fix the penalties to fit the circumstances." H. Rep., *supra*, p. 108. Thus, the trial judge, not the prosecutor, has complete discretion as to penalty under the 1954 Code.

In sum, whether one considers the policy of Congress to treat acts of tax evasion exclusively as felonies when the elements of the felony are charged and necessarily proved, or whether one has reference to the traditional rule relating to instructions upon included offenses, the proof in this case required that the jury ascertain petitioner's guilt solely with reference to Section 7201 of the 1954 Code. The requested instructions, which would have called upon the jury to act without reference to the proof before them, were properly denied.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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